APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1352

ROBERT J. ADAMS, MERREDNA T. BUCKLEY, WILLIAM J. CALLOWAY, JAMES JOSEPH CONNELL, ANTHONY MICHAEL COSELLA, JOHN R. COOK, ANNE CROWLEY, on behalf of the Estate of WILLIAM J. CROWLEY, Deceased, KATHRYN M. CULLEN, ANGELINA A. DICARLO, ROCCO DELGRAMMASTRO, KATHLEEN DIEHL, as Executrix, of the Estate of JOHN M. DILLENSCHNEIDER, Deceased, WANDA A. DOMAROTSKY, FRANK A. DREGAR, ROBERT J. EGY, AMANDA FAY, MARTHA FLINN, THOMAS E. FLOOD, CORNELIUS FRAZIER, JR., MARY GERACE, ROSE T. GUOKAS, JOHN GUY, MARY F. HABINA, JAMES HICKMAN, JOHN HUDSON, ROBERT H. JONES, PEARL KELLY, JOSEPH J. KLEIN, ELIZABETH D. LINDER, AUGUSTINE MARUCCI, JAMES MCGOWAN, ELIZABETH A. MCNALLY, JOHN MORRIS, JOHN MUMBOWER, ANNA M. MYERS, AGNES M. MYERS, JOHN A. NEFF, RUTH O'DONNELL, GRACE MARY PAPALA, ANNA PETRICCIONE, RICHARD M. PHILLIPS, RUSSELL RALLS, FLORENCE RAYSICK, DANIEL J. RONAU, BERNARD C. RUSSELL, JOHN V. RUSSELL, MARGARET RUSSELL, ANTHONY SANTOLERI, WALTER J. STANOWITCH, MADELINE T. STEIN, JOHN F. STEINMETZ, BEATRICE L. STILLWELL, MARIE SMITH, NANCY SWALLOW, MARION THOMPSON, WILLIAM J. WATTS, ANTOINETTE W. WEISS, CLIFFORD W. WILLIAMS, ROBERT WILLIAMS, JAMES C. WOLLNER, FRANK UMSTETTER, MARIE VENTI, JAMES C. WILLNER, BRIDGET BARLOW,

Appellants

v.

GOULD INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the GOULD INC. PENSION TRUST FOR HOURLY EMPLOYEES and PENSION BENEFIT GUARANTY CORPORATION,

Appellees

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 78-2365)

Argued January 24, 1984

Before: GIBBONS and BECKER, *Circuit Judges*, and ATKINS, *District Judge*•

(Filed June 28, 1984)

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• Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is a suit by a number of former employees of Gould Inc. against Gould and the First Trust Company of St. Paul Minnesota ("First Trust"), Gould's pension plan trustee, alleging that Gould violated the plaintiffs' rights by underfunding the Gould pension trust and that, despite their long service to the company, the plaintiffs have consequently been deprived of any pension benefits whatsoever. The case was brought in 1978. It has been before this court once before, on a 28 U.S.C. § 1292(b) certification. *Adams v. Gould*, 687 F.2d 27 (3d Cir. 1982).

In its simplest terms, the question presented by this appeal is whether the district court abused its discretion in denying plaintiffs' motion to alter or amend the summary judgment entered by the district court in favor of defendants and for contemporaneous leave to file a second amended complaint. The gravamen of the proposed amended complaint was that the labor union representing plaintiffs had breached its duty of fair representation, and that Gould breached the collective bargaining agreement, when Gould and the union reached a settlement implementing an arbitration award settling the underfunding dispute. This contention was asserted earlier in the litigation in plaintiffs' briefs, but was not addressed either by the district court or by this court (which limited its ruling to responding to a certified question that did not subsume that claim).

This description, however, masks the complexity of this appeal, the disposition of which will require consideration of procedural issues as well as issues of pension law and labor law. The most important issue before us involves the application of the recent Supreme Court decision in *Del Costello v. International Brotherhood of Teamsters*, ____ U.S. ____, 103 S. Ct. 2281 (1983). In *Del Costello*, the Court held that the six-month statute of limitations of section 10(b) of the National Labor Relations Act applied in the context of a suit by an employee alleging a breach of the collective bargaining agreement by the employer and a breach of the duty of fair representation by the employee's union. The issue before us is whether a different statutory period applies where the subject matter of the suit is collectively bargained pension rights.

For the reasons that follow, we believe that the motion to alter or to amend the judgment and for leave to file an amended pleading should have been granted.

We therefore vacate the judgment of the district court and remand for further proceedings.

I.

In 1962, Gould purchased the Wilkening Manufacturing Company's piston ring plant, assuming the pension plan agreement negotiated in 1953 by Local 416 of the United Automobile Workers Union ("Local 416") and Wilkening. In 1972, Gould and Local 416 entered a collective bargaining agreement, incorporating by reference the "Gould Inc. Pension Plan," ("the Plan"), which thereupon covered the past and present employees of the Wilkening plant.

In 1974, Gould decided to close the Wilkening plant. Pursuant to section 7.1 of the Plan, Gould terminated the Plan as to the employees, both currently working and retired, who were covered by the Plan due to their employment at the Wilkening plant (the "Wilkening beneficiaries"). Under section 7.2 of the Plan, the assets in the pension fund attributable to the Wilkening plant were to be used to pay pensions to the Wilkening beneficiaries according to a system of priorities specified therein. Under this system, beneficiaries already retired (the "current retirees") had the first priority, and would receive their pensions to the extent possible given the Plan's assets. If the current retirees were paid their full pensions, then the employees with ten or more years of credited time, whose rights were therefore "vested" under the Plan ("vested employees") would receive their pensions when they reached retirement age, to the extent of the remaining assets.[1] When the Wilkening plant was

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1. If the vested employees had been paid in full, the remaining assets in the Plan would then have been used to fund pensions for employees with less than ten years at the plant upon their retirement. These "non-vested" employees are not parties to this case.

closed, the assets of the pension fund were insufficient to pay the current retirees' pensions in full, and thus the vested employees were not entitled to receive pensions under the Plan when they reached retirement age.

Local 416 brought a grievance against Gould under section XVII of the collective bargaining agreement, seeking to force Gould to fund the pension benefits of the Wilkening beneficiaries in full. The grievance proceeded to arbitration. Although the arbitrator held that Gould did not have to fund the Plan in full, he found that Gould had improperly changed its actuarial assumptions in 1969 in such a way that its contributions to the Plan attributable to the Wilkening plan decreased. At about the same time, Gould had begun considering closing the Wilkening plant. The arbitrator held that the use of "less conservative" actuarial assumptions at a time when Gould was considering closing the plant was improper. The arbitrator therefore ordered the parties to determine by negotiations the amount by which Gould's contributions were less than they would have been had the proper actuarial assumptions been used, and directed Gould to pay that amount into the pension fund.

After negotiations, Gould and Local 416 agreed that the amount of the undercontribution was $570,600. They also negotiated a settlement of the grievance (the "Settlement"), pursuant to which Gould agreed to guarantee full pension rights to the current retirees in exchange for not having to deposit $570,600 with the Plan's trustee, defendant First Trust. The agreement stated that the Settlement was providing "additional retirement benefits" to the current retirees, and accordingly provided a mechanism in the settlement to increase the benefits paid to the current retirees in the event that the value of the pensions paid

under the settlement at any time became less than the value of the pensions that would have been paid if the $570,600 had been deposited. The vested employees, however, were not entitled to any benefits under the Settlement.

On July 13, 1977, the plaintiffs, a number of the vested employees, brought this suit. The complaint [2] alleged that the Plan provided for stated monthly benefits upon retirement, that the employees were induced to accept a lower wage because of these promised benefits, and that the failure of Gould to fund these benefits was a breach of the collective bargaining agreement and amounted to fraudulent inducement. The complaint also charged First Trust with breach of its fiduciary duty to plaintiffs in failing to pay benefits when due. Defendants moved for summary judgment, arguing that Gould had properly terminated the Plan pursuant to its terms. The defendants also argued that plaintiffs' claims had been resolved by the arbitration proceeding, at which the plaintiffs were represented by Local 416, and that the plaintiffs were thus bound by the arbitrator's decision. The district court denied summary judgment, holding that the arbitrator's award could not dispose of the plaintiffs' "vested" rights in the Plan.

The district court then certified, pursuant to 28 U.S.C. § 1292(b), the question "whether plaintiffs are bound by the results of the arbitration award between Gould and their collective bargaining representative and thereby barred from this suit." This court allowed the appeal, and in *Adams v. Gould*, 687 F.2d 27 (3d Cir. 1982), concluded that they were. The certified

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2. The allegations listed here are those of the amended complaint, filed on January 31, 1979. Summary judgment was entered on the basis of plaintiffs' contentions in that complaint.

question raised the issues of the power of Local 416 to negotiate for the vested employees concerning their rights after their employment at the Wilkening plant had ended, and the power of Local 416 to negotiate concerning the "vested" pension rights of the vested employees. The court held that arbitration was a form of adjudication, not negotiation, and that therefore the rule against allowing a Union to negotiate away the vested rights of its members did not apply. We also held that the pension rights of the plaintiffs were not "vested" in the legal sense, because they were dependent on the presence of funds in the Plan, that the subsequent settlement only effectuated the arbitration agreement, and thus that the union did not exceed its power in negotiating on behalf of the vested employees in reaching the Settlement. [3] We specifically limited our holding to the certified question, and declined to reach the issue now before us, although the plaintiffs tried to raise it at oral argument. Since the certified question was the only legal theory raised in the plaintiffs' complaint, and its resolution was dispositive, we reversed the judgment of the district court and directed that summary judgment be entered for the defendants. On October 6, 1982, the district court entered summary judgment.

On October 19, 1982, the plaintiffs moved to alter

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3. In disposing of the argument that, notwithstanding the fact that arbitration is not a forum of negotiation, the post-arbitration settlement resulted from impermissible bargaining over vested rights, we said:

> Although [Local 416] and Gould held further discussions following the arbitration, as their written agreement demonstrates, they merely implemented the arbitrator's award in all its sophisticated ramifications, performing the calculations he had ordered.

687 F.2d at 30.

or amend the judgment and for leave to file a second amended complaint. In the motion, plaintiffs formally advanced the theory now before us. Succinctly stated, the theory is that the settlement agreement between Local 416 and Gould was in conflict with the arbitration award, because Gould did not deposit the amount of the underpayment with First Trust as ordered by the arbitrator, and that the interests of the vested employees were compromised by the Settlement. Plaintiffs assert that, if the $570,600 had been deposited with the trustee, the trust fund would have invested the money, and because of the tremendous rise in interest rates in the late 1970's and early 1980's, would have received a sufficient return to not only pay the full pensions of the current retirees, but also to pay some pension benefits to the vested employees. Under the Settlement, however, the vested employees get nothing. Plaintiffs assert that the failure of Gould to place the $570,600 in trust violated the arbitrator's award, and thus the collective bargaining agreement. Most importantly, they also allege that, in negotiating the Settlement, Local 416 breached its duty of fair representation.

The district court denied plaintiffs' motion to reopen the judgment and amend the complaint on April 14, 1983.[4] Plaintiffs appeal, arguing that their motion should have been granted because they have asserted a meritorious claim that entitles them to benefit under the Plan, and on which the courts have not had an opportunity to rule.

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4. This district court did not assign reasons for its actions. The court may well have felt obliged to deny the motion by reason of our previous opinion. In fairness to the learned district court, we also note that it did not have the benefit of certain intervening decisions of this court and the Supreme Court that bear on the resolution of the issues in this case.

II.

We are confronted with a situation in which the district court denied a motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e), and refusal to allow the plaintiffs to file a second amended complaint pursuant to Fed. R. Civ. P. 15(a). Our problem is complicated, however, by the fact that the district court did not state the grounds on which it denied the plaintiffs' motion. We must, therefore, examine the record to determine whether there are any grounds on which we can sustain the district court's decision.

In reviewing the district court's decision, the first issue we must confront is our scope of review. Where a district court refuses to allow a plaintiff to amend his complaint pursuant to Fed. R. Civ. P. 15(a), the decision may only be reversed if the district court abused its discretion. *Heyl Patterson International, Inc. v. F.D. Rich Housing, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981). Similarly, when a district court rejects a motion to alter or amend a judgment, the standard of review is whether the district court abused its discretion. The district court's exercise of discretion, however, must be within the limits of the law. The Sixth Circuit has explicitly held that a court of appeals has plenary review on appeal from the denial of a Fed. R. Civ. P. 59(e) motion, where the decision denying the motion is based on a legal error. *Huff v. Metropolitan Life Insurance Co.*, 675 F.2d 119, 122 n.5 (6th Cir. 1982). *See also* 6A J. Moore, *Moore's Federal Practice* § 59.15[4] at 59-336. We agree, and therefore hold that, in reviewing an order denying a motion to alter or amend a judgment filed pursuant to Fed. R. Civ. P. 59(e), the appropriate scope of review over matters committed to the discretion of the district court is abuse of discretion, but over matters of law the court of appeals has plenary review.

Fed. R. Civ. P. 15 embodies the liberal pleading

philosophy of the federal rules. Under Rule 15(a), a complaint may be amended once as a matter of right and afterward by leave of the court, which is to be freely granted. *See Foman v. Davis*, 371 U.S. 178 (1962); *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597-98 (5th Cir. 1981). This liberal amendment philosophy limits the district court's discretion to deny leave to amend. The district court may deny leave to amend only if a plaintiff's delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the opposing party. *Foman v. Davis*, 371 U.S. at 182; *Bolleau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984). The court may also refuse to allow an amendment that fails to state a cause of action. *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983).

Our scope of review in this case turns on the interrelationship between the scope of review applicable to Rule 59(e) motions and that applicable to Rule 15(a) motions. The Fifth Circuit was confronted with a similar situation in *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594 (5th Cir. 1981). In *Dussouy*, the district court had dismissed the complaint without leave to amend. The court of appeals reversed, and in doing so held that, where a timely motion was filed under Fed. R. Civ. P. 59(e), the Rule 15 and Rule 59(e) inquiries turned on the same factors. 600 F.2d at 597 n.1. We agree and adopt the Fifth Circuit's approach. Thus, in examining each possible ground on which the district court could be sustained, we will apply the standard of review which would be applicable had the motion been brought without the complication of a prior grant of summary judgment, although the factors that must guide our review may be affected by the fact that a summary judgment was granted before plaintiffs sought leave to amend their complaint.

Therefore, we must first examine the substance of

the theory that plaintiffs attempted to assert in their second amended complaint, to determine whether the amended complaint states a cause of action. Next, we must consider the relationship between that claim and what was decided by the previous panel in this case, to see whether it is barred by that decision. Third, we must determine whether the cause of action is barred by the statute of limitations. Our scope of review over these three questions is plenary. Finally, we will examine the factors which must inform the district court's discretion in denying a motion to reopen a judgment and amend a complaint under Rules 59(e) and 15(a), to determine whether that discretion was abused.

III.

A.

Plaintiffs are members of Local 416 and beneficiaries under the Plan. They seek to sue Gould directly for breach of an obligation under an arbitration award entered pursuant to the grievance procedure of a collective bargaining agreement. The obligation allegedly breached affects the pension rights of the plaintiffs. In their second amended complaint, the plaintiffs also allege that Local 416 breached its duty of fair representation by entering into the settlement with Gould. The plaintiffs thus allege a breach of the collective bargaining agreement by their employers [5] and a breach of the duty of fair representation by their union. A direct suit by an employee against an employer which alleges both

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5. If the failure of Gould to pay the amount of the underpayment for the 1969-74 period into the pension fund violates the arbitration award, it amounts to a breach of the collective bargaining agreement, which obligates Gould to comply with arbitration awards.

breaches may be brought in federal court. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). [6]

Plaintiffs' theory of liability in this case is (1) that the value of the additional pension benefits that Gould provided to the current retirees under the settlement was substantially less than the value of the additional pension benefits that would have been available if Gould had deposited $570,600, the amount determined to have been the underpayment for the period 1969-1974, into the pension trust fund, and (2) that if Gould had deposited the money, part of the difference would have gone to the vested employees. The linchpin of this theory is that the higher interest rates that have prevailed since the late 1970's would have boosted the amount available for pension benefits. Rather than deposit the cash with the fund trustee, Gould agreed to guarantee specific additional pension benefits to the current retirees, with an expected value roughly equal to $570,600. In essence,

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6. Plaintiffs have also alleged a breach of fiduciary duty against the trustees of the pension fund, but not of the type that would allow them to sue their employer directly under our recent decision in Struble v. New Jersey Brewery Employees Welfare Fund, ___ F.2d ___, No. 83-5115 (3d Cir. 1984). Although they allege a breach of fiduciary duty by First Trust, the breach is not for failure to pursue remedies against Gould, and thus is not the type of breach necessary to allege a *Struble* cause of action. *Struble* allegations may not have been possible on the facts of this case, since it is unclear that either First Trust or the three-person board established by the collective bargaining agreement to decide disputes under the Plan had the power to sue Gould, which is a prerequisite to a *Struble* cause of action. For whatever reason, plaintiffs in this case sought to pursue Gould based on its violation of the collective bargaining agreement rather than a separate trust agreement, and thus must bring their suit under *Vaca v. Sipes* rather than *Struble*.

Gould chose to assume the risk (or benefit) that a change in interest rates would alter the expected value of the pension benefits guaranteed.

We are doubtful that this theory can be proved as a matter of practical economics. It may also be quite difficult for the plaintiffs to prove that Local 416 breached its duty of fair representation in entering the Settlement. [7] Since we are reviewing this case on a Fed. R. Civ. P. 12(b)(6) standard, however, and we cannot say that there is no set of facts which plaintiffs could prove that would entitle them to recover under this theory, we cannot affirm on the basis that the amendmed complaint failed to set forth a claim on which relief could be granted.

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7. It is true, of course, that $570,000 deposited at an interest rate of 12% will yield greater returns than the same amount deposited at a 6% rate. It is simplistic, however, to think that this necessarily means the trust fund would have earned more over the period of high interest rates which began in the late 1970's. For instance, if the money had been deposited in long-term government obligations bearing a 6% rate in 1978, the fact that the same obligations issued today pay over 10% would not mean that the bonds purchased six years ago would now bear the higher rate. Although those obligations have an "effective" rate of return of 10% if purchased today, they cannot be sold for their face value, but only for a discounted price reflecting the low interest rate they bear. The income stream which would be produced by a 1978 investment in such bonds would be unaffected. In order to prove their theory, plaintiffs must prove one of two sets of facts: (1) given the actual investment practices of the fund, the higher returns would have been earned; or (2) that the actual investment practices of the trust fund were not reasonable on the facts as they appeared when the practices were adopted, and that had "reasonable" practices been adopted, the higher returns would have been earned. Neither Gould nor First Trust, however, can be held responsible for failing to anticipate the consequences of the economic policies of the last two administrations, or general economic trends.

B.

Having determined that the plaintiffs state a cause of action in their second amended complaint, we must next determine whether that cause of action is barred by our previous decision in this case. The issue in the earlier appeal was whether Local 416 was empowered to pursue the rights of the plaintiffs, as their collective bargaining representative, under the pension provisions of the collective bargaining agreement. We answered that question in the affirmative, holding that the plaintiffs were "bound" by the settlement negotiated by Gould and Local 416.

Vaca v. Sipes is an exception to the general rule of labor law that members of a collective bargaining unit cannot ordinarily sue individually to vindicate their rights under the collective bargaining agreement. Although we held that general rule of labor law applicable to plaintiffs' claims against Gould in the earlier appeal, we did not pass on the *Vaca v. Sipes* exception. Since the original complaint did not contain an allegation that Local 416 breached its duty of fair representation in settling the grievance, and since the case was before us on an unrelated cerfified question, that issue was clearly not before us. [8]

We therefore conclude that our prior holding in this case is not dispositive of the cause of action which

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8. At oral argument on the prior appeal, when plaintiffs' attorney attempted to assert the theory now before the court, Judge Aldisert refused to hear arguments directed at any issue not raised by the certified question, saying:

> You can address that to Judge Weis, you are not going to get anywhere with my [sic]. Okay. I'm going to consider precisely the question certified and only the question certified.

plaintiffs attempt to assert in their second amended complaint. [9]

C.

Gould and Local 416 entered into the agreement settling the grievance on March 15, 1977. This suit was brought on July 13, 1978. In *Del Costello v. International Brotherhood of Teamsters*, ____ U.S. ____, 103 S. Ct. 2281 (1983), the Supreme Court held that the six-month statute of limitations in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), which applies to unfair labor practice cases, was also applicable by analogy in *Vaca v. Sipes* cases. [10] If the *Del Costello* limitations period is applicable in this case, this suit must be dismissed as untimely.

The Court in *Del Costello* stressed the desirability of a uniform national limitations period in *Vaca v. Sipes* cases, and noted that the reasons justifying a

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9. In our prior decision, we stated that the Settlement "merely implemented the arbitrator's award." 687 F.2d at 30. This statement was addressed to plaintiffs' argument that the Settlement amounted to independent negotiation, which Local 416 was arguably not empowered to engage in because it touched on plaintiffs' "vested rights." We rejected that argument, because the arbitrator's decision had already limited those "vested rights" to the amount available in the pension fund when it rejected plaintiffs' claim for full funding. In this case, however, the plaintiffs raise a completely new and different challenge to the Settlement. They charge that the Settlement agreement substantively failed to effectuate the arbitrator's award, and that Gould therefore must pay additional amounts in order to comply with the award. This issue was not before us in the prior appeal.

10. *Del Costello* applies retroactively. *See* Perez v. Dana Corp., 718 F.2d 581 (3d Cir. 1983); Scott v. Local 863, International Brotherhood of Teamsters, 725 F.2d 226 (3d Cir. 1984).

relatively short limitations period for unfair labor practice suits -- primarily the need to resolve disputes quickly to preserve labor peace -- are also applied in the *Vaca v. Sipes* context. Where the *Vaca v. Sipes* mechanism is being used to assert a claim against an employer for breach of a pension agreement, however, a second federal statutory period, that provided by the Employment Retirement Income Security Act, is arguably more appropriate. 29 U.S.C. § 1113(a)(2) provides for a three-year statute of limitations dating from "the earliest date (A) on which the plaintiff had actual knowledge of the breach . . ." In this case, if the ERISA statute is applicable, the plaintiffs would not be barred from bringing suit.[11]

Since no statute is directly applicable, we must examine the relevant policies in deciding which limitations period should be applied. A *Vaca v. Sipes* suit normally involves an issue that is intertwined with the day-to-day relationship between management and labor. Speed and finality in the resolution of disputes are the most relevant policies in those situations. In pension dispute, however, that policy is less relevant. Even where the litigated dispute involves the funding of a pension plan involving an entity that remains in business, rather than an entity which ceases operation such as the Wilkening plant, the immediate effect of the dispute on the day-to-day labor-management relationship is slight. The funding issue involves the immediate interests only of retirees currently receiving benefits. In many cases, as here, the funding may be adequate to pay the present beneficiaries. The

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11. It is clear under the facts that the theory asserted in the amended complaint relates back to the date the original complaint was filed under Fed. R. Civ. P. 15(c), since it arises out of "the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. . . ."

long-term interests of current employees are at stake, but delay in resolving disputes concerning those interests does not disrupt labor-management relations. Nor does the delay itself prejudice the interests of the employees.[12] The absence of an effect on their day-to-day working environment also makes it far more likely that employees will not be aware of their grievance immediately. These factors favor the application of a longer period of limitations. Section 1113 recognizes this, and provides for a three-year period in which to challenge breaches of fiduciary duty by the trustees of a pension plan.

Our reading of *Del Costello* is that it does not preclude the use of a different federal statutory period where the policies underlying the adoption of a six-month period in that case are inapplicable.[13] We believe that this is such a case. The primary holding of *Del Costello* is that, in *Vaca v. Sipes* suits, a uniform federal standard, rather than a "borrowed" state limitations period, is appropriate. The application of the six-month period provided by section 10(b) was based on the assumption that *Vaca v. Sipes* suits would involve issued relevant to day-to-day labor-management relations. We believe that there is a distinction between the implication of delay in

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12. Where a funding issue is disputed, as here, an appropriate use of prejudgment interest can eliminate any harm to the employees arising from the delay.

13. The Supreme Court has recently held that different policies are applicable in the resolution of pension disputes than are applicable in ordinary labor disputes. Schneider Moving and Storage Co. v. Robbins, ___ U.S. ___, 52 U.S.L.W. 4476, 4478 (April 18, 1984) (presumption of arbitrability applicable in ordinary labor disputes is not applicable in pension fund disputes, since concern with labor peace that underlies presumption is not relevant where dispute arises between employee pension fund and employer).

resolving disputes over pension contribution issues and the implications of delay in resolving disputes over terms of a collective bargaining agreement that affect the day-to-day operations of a business. We also believe that this distinction justifies the use of a different limitations period. Accordingly, we hold that the three-year ERISA statute of limitations applies to this suit, in spite of the fact that the vested employees' suit against Gould's is predicated on a breach of the duty of fair representation by the Union rather than on a breach of a fiduciary duty by a pension fund trustee. Thus, the suit is not time-barred.

IV.

Having determined that the plaintiffs' second amended complaint states a cause of action and is not foreclosed by our prior decision or the statute of limitations, we now turn to the factors which must inform a district court's discretion in deciding whether to allow a plaintiff to amend a complaint. As noted above, under the liberal pleading philosophy of the federal rules as incorporated in Rule 15(a), an amendment should be allowed whenever there has not been undue delay, bad faith on the part of the plaintiff, or prejudice to the defendant as a result of the delay. Although we recognize the breadth of the trial court's discretion in this area, the liberal pleading philosophy of the rules requires that a decision not to allow an amendment be justified by one of the factors listed above.

The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become "undue," placing an unwarranted burden on the court, or will become "prejudicial," placing an unfair burden on the opposing party. *See Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir.

1982); *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982). The question of undue delay, as well as the question of bad faith, requires that we focus on the plaintiffs' motives for not amending their complaint to assert this claim earlier; the issue of prejudice requires that we focus on the effect on the defendants.

Defendants assert that the plaintiffs' delay in moving to amend the complaint was in "bad faith," but they offer no facts other than the delay in support of the contention. Although, under a theory analogous to laches, delay can itself be evidence of bad faith justifying denial of leave to amend, *see* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1488 at 443-44 (1971), there is nothing in the facts before us which indicates that this is such a case. Defendants point to no extrinsic evidence of bad faith, and, as noted below, plaintiffs had a colorable excuse for not amending earlier since the district court accepted the facial validity of their original legal theory. The district court made no finding that the plaintiffs were acting in bad faith in seeking leave to amend. Accordingly, we do not find that there was any bad faith justifying the denial of leave to amend.

Nor does it appear that the plaintiffs' failure to amend the complaint earlier in the litigation constitutes "undue delay." Plaintiffs originally asserted that they were entitled to litigate their claim for "full funding" of the Plan by Gould in federal court. This claim would have entitled plaintiffs to the entire amount of their pensions as specified by the Plan. The defendants moved for summary judgment, arguing that the plaintiffs were bound by the arbitration proceeding between Local 416 and Gould, which rejected the claim for full funding. The district court denied the motion for summary judgment but certified the question, and we reversed the holding that plaintiffs were bound by the arbitration. Plaintiffs had

asserted their alternative theory, that the settlement agreement between Local 416 and Gould did not satisfy the arbitrator's award, in their briefs in the district court, and attempted to raise it on appeal, although this court declined to address it since it was not certified by the district court. Plaintiffs then tried to formalize their alternative contention by amending the complaint.

The facts of this case present an unusual situation. Where the legal theory of a complaint is rejected by the district court on a motion for summary judgment, but where an alternative theory has been raised which, on the same facts, is legally sufficient, it would be unusual for a district court not to allow the plaintiff leave to amend because of "undue delay." This case differs from the norm because the legal issue was decided by the court of appeals on a section 1292(b) interlocutory appeal rather than by the district court, but that difference should not affect the plaintiffs' ability to amend upon rejection of their original legal theory. The rationale of most cases rejecting "post-judgment" amendments -- that the plaintiff should have raised the new theory before trial -- is inapplicable. On the other hand, the rationale of the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), which held that the district court erred in not allowing plaintiffs an opportunity to allege a new legal theory after the original theory was dismissed on a Fed. R. Civ. P. 12(b)(6) motion, is more closely analogous. *See also Wilburn v. Pepsi Cola Bottling Co.*, 492 F.2d 1288 (8th Cir. 1974). Since amendment of a complaint is not unusual at the summary judgment stage of the case, *see* 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1488 at 436 (1971), we would not characterize plaintiffs' failure to amend their complaint earlier as "undue delay."

Defendants also assert that they would be

"prejudiced" if the plaintiffs are allowed to amend their complaint at this point in the litigation. They assert no particular prejudice except for additional counsel fees, but argue that there must be "finality" in the litigation process, and that allowing this amendment will delay the end of the case. Our disposition of this argument is governed by considerations similar to those discussed above. It is true that a plaintiff may not ordinarily amend his complaint after going to trial on one legal theory and losing. In this case, although the theory of the second amended complaint is based on the same facts as the original theory and could have been raised in the original complaint, the defendants have not had to litigate the facts of this case once, but rather have avoided litigating the facts by having the plaintiffs' legal theory rejected by this court in an interlocutory appeal. The defendants did not go to trial with the plaintiffs relying on one legal theory, only to have the plaintiffs try to change that theory in order to retry the same facts. They also have not obtained judgment on the merits of plaintiffs' new theory; the district court did not rule on that theory, and we specifically declined to address any other issues other than the one certified by the district court.

Neither is there anything on the facts of this case which demonstrates any particular prejudice as a result of allowing the plaintiffs to amend their complaint at this point in the proceedings. *See, e.g., Serrano Medina v. United States*, 709 F.2d 104 (1st Cir. 1983) (eleventh-hour amendment adding new parties under conspiracy theory which would require extensive additional discovery would be prejudicial to defendants); *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979) (where plaintiff seeks to amend complaint to assert "new concepts and theories" that would require extensive additional discovery and create risk that trial scheduled for three months hence will

have to be delayed, allowing amendment would be prejudicial to defendant). In light of the procedural posture of this case at the time of judgment and the failure of defendants to specify any particular prejudice, we hold that the defendants are not prejudiced by the plaintiffs' attempt to amend their complaint in order to assert a new legal theory at this point in the litigation.

Since we have concluded that the district court was not justified in rejecting the plaintiffs' motion for leave to amend their complaint by undue delay, bad faith on the part of the plaintiffs, or prejudice to the defendants, we cannot hold that the decision to deny leave to amend was within the discretion of the district court. Accordingly, the district court erred in not allowing the plaintiffs to reopen the judgment and in not granting them leave to amend their complaint.

V.

In sum, we hold that: (1) the plaintiffs' complaint states a *Vaca v. Sipes* cause of action against Gould for failure to comply with an arbitrator's award to make additional contributions to a pension plan; (2) the plaintiffs' claim is not barred by the statute of limitations, since the three-year period of 29 U.S.C. § 1113(a)(1), rather than the six-month period of 29 U.S.C. § 160(b), is applicable to a *Vaca v. Sipes* claim against an employer for failure to make required contributions to a pension plan; (3) the plaintiffs' claim is not precluded by our resolution of the previous appeal in this case; (4) our scope of review over the district court's decision to deny plaintiffs' motion to reopen the judgment and amend their complaint is plenary if the denial is based on a legal error, and otherwise is for abuse of discretion; and (5) under the circumstances of this case, where the defendants have failed to show bad faith, undue delay, or prejudice, and

where the plaintiffs' proposed amended complaint states a legal theory that is both sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6),[14] and has not been decided on the merits by the judgment plaintiffs are seeking to reopen, it was an abuse of discretion for the district court to deny plaintiffs' motion to reopen the judgment and amend the complaint.

Accordingly, the judgment of the district court will be reversed, and the case remanded for proceedings consistent with this opinion.

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14. The rule in this circuit is that affirmative defenses, such as the statute of limitations and res judicata, can be asserted on a motion to dismiss. Williams v. Murdoch, 330 F.2d 745, 749 (3d Cir. 1964). Even if the defenses had to be raised in an answer, rather than on a motion to dismiss, the test of "legal sufficiency" would not be affected.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

7/18/84

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1352

ROBERT J. ADAMS, MERREDNA T. BUCKLEY, WILLIAM J. CALLOWAY, JAMES JOSEPH CONNELL, ANTHONY MICHAEL COSELLA, JOHN R. COOK, ANNE CROWLEY, on behalf of the Estate of WILLIAM J. CROWLEY, Deceased, KATHRYN M. CULLEN, ANGELINA A. DICARLO, ROCCO DELGRAMMASTRO, KATHLEEN DIEHL, as Executrix, of the Estate of JOHN M. DILLENSCHNEIDER, Deceased, WANDA A. DOMAROTSKY, FRANK A. DREGAR, ROBERT J. EGY, AMANDA FAY, MARTHA FLINN, THOMAS E. FLOOD, CORNELIUS FRAZIER, JR., MARY GERACE, ROSE T. GUOKAS, JOHN GUY, MARY F. HABINA, JAMES HICKMAN, JOHN HUDSON, ROBERT H. JONES, PEARL KELLY, JOSEPH J. KLEIN, ELIZABETH D. LINDER, AUGUSTINE MARUCCI, JAMES MCGOWAN, ELIZABETH A. MCNALLY, JOHN MORRIS, JOHN MUMBOWER, ANNA M. MYERS, AGNES M. MYERS, JOHN A. NEFF, RUTH O'DONNELL, GRACE MARY PAPALA, ANNA PETRICCIONE, RICHARD M. PHILLIPS, RUSSELL RALLS, FLORENCE RAYSICK, DANIEL J. RONAU, BERNARD C. RUSSELL, JOHN V. RUSSELL, MARGARET RUSSELL, ANTHONY SANTOLERI, WALTER J. STANOWITCH, MADELINE T. STEIN, JOHN F. STEINMETZ, BEATRICE L. STILLWELL, MARIE SMITH, NANCY SWALLOW, MARION THOMPSON, WILLIAM J. WATTS, ANTOINETTE W. WEISS, CLIFFORD W. WILLIAMS, ROBERT WILLIAMS, JAMES C. WOLLNER, FRANK UMSTETTER, MARIE VENTI, JAMES C. WILLNER, BRIDGET BARLOW,

Appellants

---

* Honorable C. Clyde Atkins, United States District Judge for the Southern District of Florida, sitting by designation.

v.

GOULD INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the GOULD INC. PENSION TRUST FOR HOURLY EMPLOYEES and PENSION BENEFIT GUARANTY CORPORATION,

Appellees

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
(D.C. Civ. No. 78-2365)

Argued January 24, 1984

Before: GIBBONS and BECKER, *Circuit Judges*,
and ATKINS, *District Judge**

(Opinion Filed June 28, 1984)

ORDER AMENDING OPINION

It is hereby ordered that the opinion of the court filed June 28, 1984, is hereby amended to read as follows:

1. The last paragraph of the opinion is amended to read:

> Accordingly, the judgment of the district court will be vacated, and the case remanded for proceedings consistent with this opinion.

BY THE COURT:

Edward R. Becker

Circuit Judge

Dated: July 13, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1118

ADAMS, ROBERT J., BUCKLEY, MERREDNA T., CALLOWAY, WILLIAM J., CONNELL, JAMES JOSEPH, COSELLA, ANTHONY MICHAEL, COOK, JOHN R., CROWLEY, ANNE, ON BEHALF OF THE ESTATE OF WILLIAM J. CROWLEY, DECEASED, CULLEN, KATHRYN M., DiCARLO, ANGELINA A., DELGRAMMASTRO, ROCCO, DIEHL, KATHLEEN, AS EXECUTRIX OF THE ESTATE OF JOHN M. DILLENSCHNEIDER, DECEASED, DOMAROTSKY, WANDA A., DREGAR, FRANK A., EBY, ROBERT J., FAY, AMANDA, FLINN, MARTHA, FLOOD, THOMAS E., FRAZIER, CORNELIUS, JR., GERACE, MARY, GUOKAS, ROSE T., HABINA, MARY F., HICKMAN, JAMES, JONES, ROBERT H., KELLY, PEARL, KLEIN, JOSEPH J., LINDER, ELIZABETH D., MARUCCI, AUGUSTINE, McGOWAN, JAMES, McNALLY, ELIZABETH A., MORRIS, JOHN, MUMBOWER, JOHN, MYERS, ANNA M., MYERS, AGNES M., NEFF, JOHN A., PAPALA, GRACE MARY, PETRICCIONE, ANNA, PHILLIPS, RICHARD M., RALLS, RUSSELL, RAYSICK, FLORENCE, RONAU, DANIEL J., RUSSELL, BERNARD C., RUSSELL, JOHN V., RUSSELL, MARGARET, SANTOLERI, ANTHONY, STANOWITCH, WALTER J., STEIN, MADELINE T., STEINMETZ, JOHN F., STILLWELL, BEATRICE L., SMITH, MARIE, SWALLOW, NANCY, WATTS, WILLIAM J., WEISS, ANTOINETTE W., WILLIAMS, CLIFFORD W., WILLIAMS, ROBERT, UMSTETTER, FRANK,

VENTI, MARIE, WOLLNER, JAMES C., BARLOW, BRIDGET

v.

GOULD, INC. and FIRST TRUST COMPANY OF ST. PAUL, MINNESOTA, Individually and as Trustee of the GOULD INC. PENSION TRUST FOR HOURLY EMPLOYEES and PENSION BENEFIT GUARANTY CORPORATION

Gould, Inc., and First Trust Company of St. Paul, Minnesota

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-2365)

Argued August 4, 1982

Before: ALDISERT and WEIS, *Circuit Judges*, and RE, Chief Judge.*

(Filed September 2, 1982)

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* Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

The sole question presented for resolution in this interlocutory appeal certified under 28 U.S.C. §1292(b) is whether certain individual employees, plaintiffs below, are bound by the results of an arbitration between their employer and their union and thereby barred from bringing their complaint in federal court. The district court determined they were not and denied defendants' motion for summary judgment. Defendants obtained the district court's certification of the question, however, and we allowed the appeal. We reverse.

I.

In 1962, appellant Gould, Inc. purchased the Wilkening Manufacturing Co. piston ring manufacturing plant, whose employees were represented by Local

416 of the United Auto Workers. The union and Gould entered into successive collective bargaining agreements as well as a pension agreement whose trust assets are administered by appellant First Trust Co. In 1973, because of its "antiquated plant, . . . failing product line, intense competition, and a declining market share," Gould announced its intention to terminate operations at the plant and to release all of the employees. Gould and UAW representatives met to discuss the phase-out of operations, including the ramifications for the pension plan. Determining that the plan's assets were actuarially insufficient to provide full benefit payments to all claimants and retirees, the union demanded that Gould fully fund the plan. When Gould refused, the union filed a grievance under Article XVII ("Grievance Procedure") of the collective bargaining agreement, even though Article XII ("Pension Plan") of the same agreement established procedures for the resolution of pension disputes.

Unable to resolve the dispute, Gould and the union submitted it to a single arbitrator pursuant to the final step of Article XVII. The union again demanded that Gould fully fund the plan or, alternatively, fund it on a sound actuarial basis. Gould argued that it had met its contractual obligations. Professor John Perry Horlacher, Chairman of the University of Pennsylvania Department of Political Science and former Vice President of the National Academy of (Labor) Arbitrators, served as arbitrator and found that Gould had not properly funded the plan. On November 24, 1975, he issued an award which in part ordered the following:

> 5. The Company is directed to make further contributions to the fund, using to calculate them the assumptions that were in effect at the end of 1968. These shall be in addition to the contributions already made.
>
> 6. These additional contributions shall be for the period when the changed assumptions were made effective after 1968 until the Plan terminated.

7. In the event of disagreement concerning the amount of these additional contributions, the Company's and the Union's actuaries shall negotiate the sums. If they cannot agree, their contentions in writing shall be forwarded to me and I will make the determination.

8. The money put into the Plan's fund by direction of this award shall be distributed to the eligible employees in accordance with Section 7.2 of the Plan contract as modified by any side agreement in effect at the time of the Plan's termination.

Although the arbitrator rejected the union's demand for full funding, he required Gould to recalculate its contributions so that the benefits could be increased in line with the pension agreement's asset allocation provisions. The union, by its counsel and actuary, reviewed the new computations and agreed that they complied with the arbitrator's award. The record does not indicate that this post-arbitration activity was anything more than what a Gould official characterized as "a question of implementing the award and . . . working out numbers."[1] The union also released any employee claims against Gould arising from the arbitration.

Appellees, active employees whose pension benefits had vested,[2] contended that although some additional

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1. Appellees contend there were no facts in the record supporting appellants' statement that the process of reaching the final amount of $570,000 was "simply a mechanical implementation of the award." The testimony quoted in the text supports appellants' position, however, and appellees introduced no evidence to rebut it.

2. Under section 4.4 of the pension agreement, "vested benefits" were described as follows:

> A participant whose employment is terminated for a reason other than his retirement or his death, who has a minimum of ten years of credited service shall be entitled to the vested benefit consisting of a pension, the monthly amount of which shall equal the normal retirement benefit. The vested benefit shall be payable on the first day of each month beginning with the participant's normal retirement date and ending upon the first day of the month in which his death occurs.

money was placed in the trust fund, the dispute was resolved so as to give them no benefits while giving retired employees full benefits. They brought an action in the district court claiming that Gould had breached its contractual obligation under the pension plan and had fraudulently induced the plaintiffs to continue their employment, and that First Trust had breached its fiduciary duty in refusing to pay pension benefits when due. Defendants, citing the finality provision of the Article XVII grievance procedure, moved for summary judgment on the ground that the plaintiffs were bound by the arbitrator's award. Basing its decision on *Hauser v. Farwell, Ozmun, Kirk & Co.*, 299 F.Supp. 387 (D.Minn. 1969), the district court denied the motion. The court was of the view that in submitting the dispute to arbitration, Gould and the union had attempted to "bargain away" rights that were vested under the plan:

> Accordingly, the court finds that the union and Gould impermissibly engaged in a negotiation endeavor which resulted in the divestiture of the plaintiff's pension rights. As a consequence, because the plaintiffs did not consent, the settlement and release are inapplicable as a bar to the present action.

Adams v. Gould, Inc., No. 78-2365, mem. op. at 11-12 (E.D. Pa. May 12, 1981). In response to defendants' subsequent motion, however, the district court certified for appeal the question now before this court: "Whether Plaintiffs are bound by the results of the arbitration between Gould and their collective bargaining representative and thereby barred from this suit."

II.

Because the district court relied on *Hauser v. Farwell, Ozmun, Kirk & Co.*, we begin our discussion

with that case. We are persuaded that its holding and reasoning are irrelevant to the case before us. The union and the company in *Hauser* entered into *negotiations* that detracted from vested rights of certain employees; under those circumstances the court stated that it was bound by *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), *aff'd*, 327 U.S. 661 (1946), and held that although a union may bargain as to prospective matters, it cannot bargain away accrued or vested rights of its members. *Hauser* involved no arbitration proceeding; indeed, the court noted that the "collective bargaining contract containing grievance procedures had become defunct." 299 F.Supp. at 392.

In the case at bar, however, Gould and the union did not bargain or negotiate; rather, they referred the matter to arbitration pursuant to a viable collective bargaining agreement. Apparently the district court mistakenly equated arbitration — a method of adjudication — with negotiation and bargaining. Appellees contend that the final agreement was a product of negotiation independent of the arbitration. Although the union and Gould held further discussions following the arbitration, as their written agreement demonstrates, they merely implemented the arbitrator's award in all its sophisticated ramifications, performing the calculations he had ordered. Paragraph 7 of the award shows that the arbitrator clearly contemplated that, because of the nature of actuarial assumptions, the parties would be likely to differ about the details of the funding, and therefore he directed them to resolve those differences between themselves, if possible.

Moreover, we believe that in its application of *Hauser*, the district court embraced the fallacy of *petitio principii* by assuming the conclusion that *sum certain* financial rights under the pension plan already had vested in the plaintiffs. The clear words of the pension plan

militate against this assumption,[3] for its schedule of priorities for distribution upon plan termination provides that "to the extent that such assets are sufficient," they are to be distributed first to retirees, then to participants with vested interests "in full if the remaining assets be sufficient, otherwise on a proportional basis." Thus, the agreement was drafted in contemplation of a circumstance where there might not be enough money to go around, and the employees' "vested" right was only a right to participate in whatever distribution there might be. *See United Steelworkers v. Crane Co.*, 605 F.2d 714 (3d Cir. 1979).

In sum, neither the arbitration nor the post-award agreement can be said to represent independent negotiation to disturb rights that were already vested;[4] accord-

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3. Section 7.2 of the pension agreement establishes the following schedule of priorities:

> Upon the termination of the plan with respect to any group of employees, that part of the assets available under the method of funding in effect upon the date of termination which is allocable to the terminated group shall be applied, to the extent that such assets are sufficient, so as to provide retirement benefits (based upon service credited to the date of termination) for participants in the following order of precedence:
>
> (a) to continue the payment of retirement benefits to retired participants, in full if the available assets be sufficient, otherwise on a proportional basis;
>
> (b) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to inactive participants and active participants having vested interests in the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis; and
>
> (c) to provide for the deferred payment of retirement benefits, beginning on their respective normal retirement dates, to active participants not having vested interests in the plan, in full if the remaining assets be sufficient, otherwise on a proportional basis.

4. We note that in the agreement the parties stated:

> Notwithstanding the foregoing, the UAW, if Gould should breach this Agreement, may elect to enforce the terms of this

ingly, we conclude that the district court's reliance on *Hauser* was error. We now turn to the intertwined questions of whether the issue was appropriate for arbitration under the collective bargaining agreement and, if so, whether the parties used the proper arbitration provision.

III.

If there is any expression of public policy pertaining to labor-management relations that has emerged loud and clear in today's jurisprudence it is the national policy favoring arbitration of labor disputes. The governing principles are familiar. Federal labor law imposes on the parties to a collective bargaining agreement no inherent duty to arbitrate; instead, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The arbitrability of a given dispute is to be determined by the court on the basis of its interpretation of the agreement. In this, the court must be mindful of the federal labor policy encouraging arbitration of labor disputes. The Supreme Court has established a strong presumption favoring arbitrability:

> [T]o be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, ... [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that

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Agreement or to enforce the opinion of Arbitrator Horlacher. If the UAW elects to enforce said Arbitrator's opinion, then Gould shall be given full credit for any and all payments made pursuant to this Agreement.

We construe this to mean that the parties had reached an agreement as contemplated in paragraph 7 of the arbitrator's award. In the event that Gould breached the agreement, then, consonant with paragraph 7, the union had the right to apply to the arbitrator "to make the determination" of the additional contributions.

> the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). *See* cases collected in *Eberle Tanning Co. v. Section 63L*, ____ F.2d ____, No. 81-2899 (3d Cir. June 28, 1982). Consistent with this policy, the Supreme Court has held that arbitration awards bind not only the union, but also all employees represented by the union. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 n.4 (1981) ("an arbitration award stands between the employee and any relief which may be awarded against the company"). *See also Panza v. Armco Steel Corp.*, 316 F.2d 69 (3d Cir.)(per curiam), *cert. denied*, 375 U.S. 897 (1963).

A.

We have no difficulty applying these precepts to the collective bargaining agreement before us. Although, as appellees stress, Article XVII appears to focus on shop-related disputes, it is not limited to those issues.[5]

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5. Article XVII details a six-step grievance procedure. Submission of a dispute to an arbitrator is controlled by step (1) of section 1, and by section 2.

> SECTION 1. It is understood that any questions that may arise in the minds of employees are to be presented to their Foreman in the regular course of work. It is further understood that the Union shall have the right to submit the question of a discharge to the Grievance Procedure. Information concerning work, working conditions and Company rules and regulations will be supplied by the employees' Foreman. Instructions shall be given by the Foreman of a department, or designated employees of the department, or the Training Department, with the knowledge and sanction of the Foreman. If in the course of work any misunderstanding occurs which the Foreman cannot settle, thereby leading to a grievance, the following procedure shall be followed:
>
> • • •
>
> Step (6). If the grievance cannot be settled promptly and amicably between the parties hereto as outlined above,

Indeed, the opening sentence of Article XVII demonstrates the parties' understanding that the grievance procedure would be used to resolve "any questions that may arise in the minds of employees." Pension matters properly could be included among these questions, as the pension agreement is, by incorporation in Article XII, made part of the collective bargaining agreement. We are persuaded that the differing views in funding the plan were serious and resulted from varying but reasonable interpretations of Gould's contractual duties under the pension plan. The union argued that the pension agreement required either full funding or funding on a sound actuarial basis; Gould's response was based on section 5.3 of that same agreement:

> Gould's board of directors shall determine the method by which the plan shall be funded and may

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> such matter shall be jointly referred within a period of thirty (30) days following the Company answer in Step 5, to the Federal Mediation and Conciliation Service, who shall be requested to submit a list of five arbitrators' names, from which list the Company and the Union shall each strike out not more than two such names. The Service shall then appoint an arbitrator from the list whose name has not been stricken as aforesaid. The arbitrator shall render his decision within thirty (30) days after presentation of the case. The party losing the case shall pay the cost for the services of the arbitrator. The arbitrator shall have the authority to assess one or the other of the parties the entire cost or divide it in any proportion between them when the decision is such that the losing party cannot be readily identified. Each party shall bear the expense of preparing and presenting its own case and the cost of their own representatives.
>
> SECTION 2. The arbitrator may consider and decide only the particular grievance presented to him by the Company and the Union, and his decision shall be based solely upon his interpretation of the provisions of this Agreement. The arbitrator shall not have the right to amend, take away, modify, add to, or change any of the provisions of this Agreement. The decision of the arbitrator shall be final and binding on the Company, Union and employees and shall be carried out by them without strike, slow-down, or lockout.

> change the method of funding from time to time. . . . [I]f each participating employer makes the contributions required by the computation of the actuary . . . the participating employer shall have no further responsibility for the payment of benefits provided by the plan . . . .

In our view the dispute between the UAW and Gould over this pension plan was a classic case for arbitration.

B.

Nor can we agree with appellees that Gould and the union employed an inappropriate procedure. Appellees argue that the arbitration parties erred in using the agreement's general grievance procedure, that they should have presented the dispute to a three-person board for resolution under Article XII.[6] The crucial difference between the two procedures is that unlike Article XVII, Article XII has no provision that the board's determination will be final and binding.

We conclude that the union and Gould properly chose arbitration under Article XVII. The informal procedure outlined in Article XII deals with relatively simple issues, such as dates of individual service or matters relating to dates of individual retirement. The very structure of the Article XII board — one employee, one management representative, and a third member to be chosen by the first two — suggests that the parties to the

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6. Article XII in part directs that

> A board composed of 1 employee and 1 management member shall be established at the Union group location to settle any differences or disputes regarding the application of provisions of the plan to employees including differences or disputes concerning any extension of retirement date. The board shall also include an impartial chairman chosen by its members.

agreement contemplated that the three-person board would be required to resolve only uncomplicated issues concerning merely the *application* of the plan. By contrast, the dispute in this case centered on *interpretation* of basic provisions of the plan, required sophisticated actuarial computations, and concerned all of the covered employees. The particular credentials of the arbitrator chosen here — a nationally known specialist who had to grapple with esoteric problems of pension plan funding — is in itself a strong indication that the parties intended that the more formal arbitration provisions of Article XVII were to be employed in the interpretation of the actuarial provisions of the collective bargaining agreement and the pension plan it incorporated.[7]

IV.

Accordingly, we answer the certified question in the affirmative: the plaintiffs in the district court were bound by the results of the arbitration between Gould and their collective bargaining representatives and therefore barred from bringing the action in district court.[8]

---

7. As further indication of the dispute's complexity, in the proceedings before the arbitrator the UAW was represented by a member of the Philadelphia bar experienced in labor litigation by a UAW assistant general counsel, by a UAW actuary, by the president of Local 416, and by other members of the local. Such an array does not indicate that the matter was one for informal resolution under Article XII.

8. We need not and do not reach appellants' contention that the district court action was barred by the applicable statute of limitations.

The order of the district court will be reversed and the proceedings remanded with a direction to enter summary judgment in favor of the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit